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No. 98-912

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

MARVIN O. ROSS,

Petitioner,

vs.

INDIANA STATE TEACHERS ASSOCIATION and
ISTA INSURANCE TRUST, INC.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT ISTA INSURANCE TRUST, INC.

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QUESTION PRESENTED[1]

Whether the plan administrator of a welfare benefit plan governed by the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. §§ 1001 *et seq.* (ERISA), who has the "right to interpret the terms and provisions of the Benefit Plan . . . including the right to remedy or resolve possible ambiguities, inconsistencies, or omissions in the Benefit Plan," abused its discretion by interpreting the Benefit Plan to allow the plan administrator, when the plan administrator is determining whether the participant is able to "perform the substantial duties of the participant's employment" and thus entitled to receive "Total Disability" benefits under the Benefit Plan, to consider actual accommodations offered to the Benefit Plan participant by his employer so the participant can return to his employment, where the Benefit Plan is silent on the issue of whether employer accommodations can be considered by the plan administrator.

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1. The Petitioner seeks a Writ of Certiorari on two questions. Only the Petitioner's second question pertains to Respondent ISTA Insurance Trust. Accordingly, this Brief in Opposition addresses only the Petitioner's second question, which the Trust believes should be restated as set out above.

STATEMENT PURSUANT TO RULE 29.6

Petitioner Marvin O. Ross was the plaintiff-appellee and cross-appellant in the court below. Respondent ISTA Insurance Trust, Inc. (misidentified by the Petitioner as the "Indiana State Teachers Association Insurance Trust") was the defendant-appellant below and has no nonwholly owned subsidiaries. The parent corporation of the ISTA Insurance Trust, Inc. is the Indiana State Teachers Association, Inc. Respondent Indiana State Teachers Association was the defendant-cross appellee below.

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STATEMENT OF THE CASE

The Seventh Circuit reversed the district court's judgment against the ISTA Insurance Trust on Petitioner's claim brought under the Employee Retirement Income Security Act of 1974, as amended 29 U.S.C. §§ 1001 *et seq.* (ERISA). Pet. App. at A-15 to A-27. The Seventh Circuit also affirmed the district court's entry of summary judgment in favor of the Indiana State Teachers Association and against the Petitioner on the Petitioner's claim against the Indiana State Teachers Association brought under the Americans with Disabilities Act, 42 U.S.C. §§ 12101 *et seq.* (ADA). Pet. App. at A-28 to A-37. Because only the Petitioner's ERISA claim pertains to the ISTA Insurance Trust, the ISTA Insurance Trust addresses in this Statement of the Case only the facts and proceedings that relate to Petitioner's ERISA claim.

A. The Petitioner

Marvin Ross was employed by the Indiana State Teachers Association from 1972 to 1994 as a UniServ Director. Pet. App. at A-3. In this capacity, Ross was responsible for representing the Indiana State Teachers Association and its teacher members in the greater Fort Wayne, Indiana area. *Id.* His duties included providing advice and consultation with respect to collective bargaining, processing grievances, unfair labor practices, organizing, program development, and other employment-related matters. *Id.*

B. The Respondents

Respondent ISTA Insurance Trust and Respondent Indiana State Teachers Association are separate entities. Respondent Indiana State Teachers Association is a labor organization that represents teachers in Indiana (the "Teachers Union"). *Id.* The ISTA Insurance Trust is, on the other hand, a multi-employer trust (the "Trust") created in 1985, which is governed by a board of trustees. *Id.* at A-5 and n.5. The Trust is a not-for-profit corporation

established to provide various fringe benefit plans and to make such plans available primarily to the employees of Indiana school corporations and their dependants, but also to others. *Id.* Among other things, the Trust administers the long-term disability income benefit plan (the "Plan") provided to employees of the Teachers Union. *Id.* at 5.

C. Ross' Disability and His Receipt of "Total Disability" Benefits Under the Plan

Ross has suffered from a degenerative hip condition for about forty years. *Id.* at A-4. Over the years, both before and after starting employment with the Teachers Union, Ross underwent numerous surgeries, including hip replacement surgeries. *Id.* The Teachers Union was aware of Ross' medical condition and it accommodated him over the life of his career with the Teachers Union, even before enactment of the Americans with Disabilities Act. *Id.* at A-4 and n.3.

In September 1992, Ross again experienced pain in his right hip. *Id.* at A-4. Ross visited Dr. Miguel Cabanela at the Mayo Clinic, who had performed Ross' most recent hip surgery. *Id.* at A-4 and A-57 to A-58. Dr. Cabanela took Ross off of work for an indefinite period. *Id.* at A-4 to A-5. In February 1993, Dr. Cabanela performed a hip replacement on Ross. *Id.* at A-5.

On March 29, 1993, Ross completed the mandatory 180 day waiting period before receiving disability benefits under the Plan. *Id.* Ross had applied for "Total Disability" benefits under the Plan. *Id.* The Plan defines "Total Disability" as follows:

> "Total Disability" (or Totally Disabled) for the first sixty (60) months of disability means the participant is disabled and unable to perform the substantial duties of the Participant's employment.

Id. There is no dispute that Ross was "Totally Disabled" under the Plan immediately before and for some time after his hip replacement surgery in February 1993.

After his surgery in February 1993, Ross returned to the Mayo Clinic for periodic checkups at least once every six months. *Id.* at A-58. In February 1994, one year after his surgery, the third-party administrator of the Plan, the Huttleston Benefit Group, routinely asked Dr. Cabanela to complete a questionnaire to help determine whether Ross remained "Totally Disabled" under the Plan. *Id.* at A-6. Dr. Cabanela reported that Ross remained totally disabled, but stated that Ross could do sedentary work if it did not require excessive walking or use of stairs. *Id.*

Dr. Cabanela's mixed response caused Huttleston to question whether Ross in fact remained "Totally Disabled" under the Plan. *Id.* at A-6 to A-7. Huttleston suggested to Bruce Rogers, CEO and Director of the Trust, that Ross undergo an independent medical examination ("IME") to determine if Ross remained "Totally Disabled." *Id.* at A-7. Rogers told Huttleston he believed Ross would likely return to work (as he had always done in the past), and that Ross should be given additional time to recover and perhaps return to work on his own. *Id.* The Trust continued to pay Ross "Total Disability" benefits under the Plan.

In July 1994, Ross still had not returned to work. *Id.* Huttleston again requested permission from the Trust to have an IME to clarify the status of Ross' disability. *Id.* At that time, Rogers consented to having an IME. *Id.*

On July 25, 1994 an IME was conducted by an independent physician, Dr. Michael Keating of the Center for Hip and Knee surgery in Mooresville, Indiana. *Id.* Dr. Keating was hired to perform the IME by Crawford & Company, an independent company specializing in identifying independent physicians to conduct IMEs. Dr. Keating determined that Ross could work if he did not have to move very often, lift objects or climb stairs, and if

he could use a cane full-time. *Id.* Dr. Keating stated in his report that Ross was, "[o]verall in very good health," that Ross' "hip actually looks outstanding." Dr. Keating also stated, "He does have a well done CPT Ling bone graft technique," and, "[h]is hip problem has now been fixed and it does appear that he is now better than when he was working full duty prior to September 1992."

A three-person committee at Huttleston considered the reports of Dr. Cabanela and Dr. Keating, the job requirements for a UniServ Director, and other information, and determined that Ross was no longer "Totally Disabled" under the Plan, as he was able to perform the substantial duties of his employment. *Id.* Accordingly, Huttleston determined that Ross' "Total Disability" benefits should be terminated. *Id.* at A-7 to A-8. On October 11, 1994, Huttleston sent a letter to Ross advising him of its decision to terminate his benefits and advising him of his right to appeal that decision to the Board of Trustees of the Trust, which serves as the Plan Administrator of the Plan. *Id.* at A-8.

Ross disagreed with Huttleston's decision. He initiated an administrative appeal to the Board of Trustees.

In the meantime, Ross began to make efforts to return to work for the Teachers Union as a UniServ Director. *Id.* at A-8 to A-12. Ross and his family doctor, Dr. Philip Johnson, prepared a list of accommodations that Ross believed were necessary for Ross to return to work. *Id.* at A-42. Although the Teachers Union agreed to most of the requested accommodations, Ross and his employer were unable to reach a final agreement over all of the accommodations that would be provided for Ross. *Id.* at A-10 to A-12. The Teachers Union terminated Ross' employment when he failed to return to work on a specified date. *Id.* at A-12.

D. Ross' Administrative Benefit Appeal

On February 3, 1995, a hearing on Ross' administrative appeal of the termination of his "Total Disability" benefits was conducted in Indianapolis by the Board of Trustees of the Trust. *Id.* at A-12 to A-13. Ross was able to drive his automobile for the two-hour trip from Fort Wayne to Indianapolis to attend the hearing in person.

Because three of the Trustees were also officers of the Teachers Union, those three Trustees recused themselves from the hearing and from deciding Ross' appeal to avoid any possible conflict of interest in light of Ross' ongoing dispute with his employer over his failure to return to work and his termination. *Id.* at A-13. Accordingly, a quorum of five Trustees, all of whom were school room teachers from across Indiana, attended the administrative hearing and decided Ross' administrative appeal. *Id.* at A-60.

Prior to the hearing, the five teacher Trustees reviewed the administrative record, including the medical reports of Dr. Cabanela and Dr. Keating. *Id.* at A-61. At the hearing, Ross presented information to support why he believed that his benefits should be reinstated. The Trustees asked Ross questions. They were able to observe Ross while he articulated and advocated his case — essentially the same physical activity that was required of a UniServ Director. They asked Ross to describe an average day in his life. *Id.* at A-62. The Trustees were also made aware that shortly before the hearing Ross had driven himself to Florida and back for a vacation. Ross had traveled each way in the normal two-day period it would take a healthy person to travel by car from Indiana to Florida. Rogers, who is not a Trustee but who attended the hearing in his capacity as the CEO and Director of the Trust, showed the Trustees a videotape of Ross that was made by a private investigator. *Id.* at A-62. The videotape showed Ross driving his car, getting in and out of his car, walking in and out of

a grocery store, bending over to lift bags of groceries out of his car, and carrying groceries into his daughter's home. *Id.* at A-13. The five teacher Trustees also heard from Doyle McAllister, Associate Executive Director for Field Services of the Teachers Union, who spoke to the Trustees about the job duties of a UniServ Director and the accommodations offered to Ross by the Teachers Union so that Ross could return to his work as a UniServ Director. *Id.*

After the hearing, the five teacher Trustees voted 3-2 to affirm termination of Ross' "Total Disability" benefits.

On February 21, 1995, Rogers sent Ross a letter informing him of the Trustees' decision. *Id.* at A-68 to A-72. The letter stated that the

> Trustees made their decision in the context of the requirements of your professional position as a UniServ Director, the restrictions placed upon you by your doctors and the accommodations offered by your employer as required by the Americans with Disabilities Act.

Id. at A-69. The letter listed several accommodations that had been offered by the Teachers Union, including: (1) providing an appropriately equipped vehicle; (2) assuring that meetings would be held in areas that would not require harmful stair climbing; (3) allowing a flexible schedule to accommodate "bad" days; and (4) providing a handicapped parking space. *Id.* at A-71. The letter explained that the Trustees, "believed that with [the Teachers Union's] accommodations [Ross] could perform the substantial duties of [his] employment." *Id.* Because the Trustees concluded that Ross was no longer "Totally Disabled" under the Plan, the Trustees denied Ross' claim for continued "Total Disability" benefits under the Plan. *Id.* at A-72.

E. The District Court Proceedings on Ross' Claim Against the Trust

Ross filed a lawsuit in the United States District Court for the Northern District of Indiana asserting claims against both the Trust and the Teachers Union. Although Ross initially asserted a number of federal and state law claims against the Trust, when the Trust filed a motion for summary judgment on most of those claims Ross conceded that the only actionable claim he had against the Trust was for reinstatement of his Total Disability benefits under Section 502(a)(1)(B) of ERISA, 29 U.S.C. § 1132(a)(1)(B). *See id.* at A-39 to A-40.

The Trust moved for partial summary judgment on Ross' remaining ERISA claim. The Trust sought a determination that the district court would apply the deferential ERISA standard of review when deciding whether the Trustees properly denied Ross' administrative appeal to have his "Total Disability" benefits reinstated.

The Plan grants the Trustees, "all powers as may be necessary to carry out the provisions of the [Plan]," and specifically grants the Trustees, "the right to make any finding of fact necessary or appropriate for any purpose under the [Plan] including but not limited to the determination of eligibility for and the amount of any benefit payable." *Id.* at A-46. The Plan also grants the Trustees,

> the right to interpret the terms and provisions of the [Plan] and to determine all questions arising under the [Plan] . . ., including without limitation, the right to remedy or resolve possible ambiguities, inconsistencies, or omissions,

and states,

> all findings of fact, determinations, interpretations, and decisions of the [Trustees] shall be conclusive and

> binding on all persons having or claiming to have any interest or right under the [Plan].

Id. at A-46 to A-47. In light of this Plan language the district court ruled, "it is clear . . . that the drafters' intent was to grant the Trustees the broadest possible discretion. . . ." *Id.* at A-48. The district court agreed with the Trust that review of the Trustees' decision would be only for an abuse of discretion, and granted the Trust's motion for partial summary judgment. *Id.* at A-49 to A-50.

The case proceeded to trial solely on Ross' ERISA claim. *Id.* at A-57. At trial, Ross maintained that the decision to terminate his "Total Disability" benefits was arbitrary and capricious because it was, in Ross' opinion, the result of an alleged personal animus that Ross believed Rogers harbored against him, or because of some conspiracy between the Trust and the Teachers Union. *Id.* at A-65 to A-66. The district court found against Ross on his theories, holding that Ross' personal animus and conspiracy allegations were supported by nothing more than Ross' speculation. *Id.* at A-66.

Even though the district court rejected Ross' personal animus and conspiracy theories, the district court entered judgment on Ross' ERISA benefit claim in favor of Ross and against the Trust. The district court concluded that the Trust had abused its discretion by terminating Ross' "Total Disability" benefits. The district court based its decision on an argument that Ross raised for the first time in his post-trial brief. In that brief, Ross argued, among other things, that it was an abuse of discretion for the Trustees to consider the reasonable accommodations that the Teachers Union offered Ross so that he could return to work as a UniServ Director. According to Ross, the definition of "Total Disability" contained in the Plan did not mention reasonable accommodations, and in Ross' opinion it was improper for the Trustees to consider those accommodations when deciding whether Ross could perform the substantial duties of his employment as a UniServ Director. The

district court agreed with Ross on this single issue. *Id.* at A-63 to A-65. It ruled that because the Plan did not expressly and unequivocally allow the Trustees to consider the accommodations actually offered to Ross by his employer, the Trustees abused their discretion by considering those accommodations when deciding that Ross was no longer "Totally Disabled." *Id.* at A-65.

F. The Court of Appeals' ERISA Decision

On appeal, the Seventh Circuit held that because the Plan was silent on the issue of whether the Trustees could consider the reasonable accommodations offered to Ross by the Teachers Union, and because the Plan granted the Trustees the discretion to interpret the Plan and resolve any and all ambiguities or omissions, the Trustees acted reasonably and within their discretion by considering the accommodations that were actually offered to Ross by his employer. *Id.* at A-15 to A-27. Accordingly, the Court of Appeals reversed the district court's entry of judgment against the Trust on Ross' ERISA claim. *Id.* at A-27.

REASONS FOR DENYING THE WRIT[1]

I. THE SEVENTH CIRCUIT'S ERISA DECISION IS BASED ON THE WELL-ESTABLISHED, UNIVERSALLY ACCEPTED RULE THAT WHERE A PLAN ADMINISTRATOR HAS DISCRETION TO INTERPRET AN ERISA PLAN THE PLAN ADMINISTRATOR'S INTERPRETATION WILL NOT BE DISTURBED SO LONG AS IT IS REASONABLE.

In his Petition, Ross ignores a critical factor in this case. Ross fails to recognize that both the district court and the court of appeals held that the deferential ERISA standard of review applies in this case because the Plan grants the Trustees broad discretion to interpret the Plan, resolve ambiguities and omissions in the Plan, and to determine a claimant's eligibility for benefits under the Plan. As a result, the Trustees' decision to terminate Ross' "Total Disability" benefits is properly reviewed only for an abuse of discretion. In order to reverse the Trustees' decision a court must find that the Trustees' decision is unreasonable. Ross' expression of the second question presented in his Petition (at i), and his recitation of the facts and judicial proceedings below (at 2-8), omit any reference to the Plan's grant of discretion to the Trustees or the application of the deferential ERISA standard of review. Ross' failure in his Petition to recognize that the deferential ERISA standard of review applies in this case is curious because the Seventh Circuit's decision to reverse the district court hinged on the Seventh Circuit's proper application of the deferential standard.

During the course of the district court proceedings, Ross unsuccessfully raised a number of arguments all suggesting that the Trustees' decision to terminate his benefits was improper.

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1. The Petitioner seeks a Writ of Certiorari on two questions. Only the second question pertains to the Petitioner's ERISA claim, which is Petitioner's only claim against the Trust. Accordingly, the Trust's stated reasons for denying the Writ address only the Petitioner's second question.

Ultimately, Ross' only successful argument was that the Trustees' decision to terminate Ross' "Total Disability" benefits was improper because the Trustees considered the reasonable accommodations offered to Ross. According to Ross, because the Plan does not *expressly* allow the Trustees to take those accommodations into consideration when deciding if Ross was unable to perform the substantial duties of his employment, the Trustees abused their discretion by considering those accommodations, and in doing so they effectively "rewrote" the Plan.

Ross' argument that the Trustees "rewrote" the Plan falls apart, however, when the deferential ERISA standard of review is properly applied to the facts in this case. As the Seventh Circuit correctly noted, under the deferential standard of review the plan administrator's decision as to the proper interpretation of a plan must be followed unless the plan administrator's interpretation is unreasonable. *Gallo v. Amoco Corp.*, 102 F.3d 918, 921 (7th Cir. 1996), *cert. denied*, __ U.S. __, 117 S. Ct. 2532 (1997). Where, as in this case, the plan is silent or ambiguous on an issue, the plan administrator's decision controls so long as it is reasonable and does not contradict the express terms of the plan. *Id.* at 922. "That is implicit in the idea of deferential review of the plan administrator's interpretation." *Id.*

In this case there is nothing in the Plan that prohibits the Trustees from considering employer accommodations. The Trustees did not "rewrite" the Plan. Instead, they clarified an omission or an ambiguity in the Plan — *i.e.*, an issue on which the Plan was silent. Under the circumstances presented, it was not unreasonable for the Trustees to consider the accommodations that were actually offered to Ross so that he could return to his regular employment as a UniServ Director.

The rule that where an ERISA plan gives a plan administrator the discretion to interpret the plan the administrator's decision

will control unless the decision is found to be unreasonable or an abuse of discretion was first adopted by this Court in *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989). Since then, the *Firestone* rule has been universally recognized by the federal appellate circuits. *See, e.g., Shockley v. Alyeska Pipeline Serv. Co.*, 130 F.3d 403, 405 (9th Cir. 1997); *Mitchell v. Eastman Kodak Co.*, 113 F.3d 433, 437 (3d Cir. 1997); *Gallo v. Amoco Corp.*, 102 F.3d 918, 921 (7th Cir. 1996); *Jordan v. Retirement Comm. of Rensselaer Polytechnic Inst.*, 46 F.3d 1264, 1271-72 (2d Cir. 1995); *The Sheppard & Enoch Pratt Hosp., Inc. v. Travelers Ins. Co.*, 32 F.3d 120, 123-24 (4th Cir. 1994); *Haubold v. Intermedics, Inc.*, 11 F.3d 1333, 1336-37 (5th Cir. 1994); *Johnson v. Eaton Corp.*, 970 F.2d 1569, 1570-72 (6th Cir. 1992); *Millensifer v. Retirement Plan for Salaried Employees of Cotter Corp.*, 968 F.2d 1005, 1009-1010 (10th Cir. 1992); *Cox v. Mid-America Dairymen, Inc.*, 965 F.2d 569, 570-73 (8th Cir. 1992); *Block v. Pitney Bowes, Inc.*, 952 F.2d 1450, 1453-54 (D.C. Cir. 1992); *Brown v. Blue Cross and Blue Shield of Ala., Inc.*, 898 F.2d 1556, 1559 (11th Cir. 1990), *cert. denied*, 498 U.S. 1040 (1991); *Curtis v. Noel*, 877 F.2d 159, 161-62 (1st Cir. 1989).

Ross does not argue in his Petition that the Seventh Circuit misapplied the *Firestone* rule in this case. Ross does not argue in his Petition that the *Firestone* rule should be abandoned or altered. Ross simply ignores the *Firestone* rule.

The Seventh Circuit's ERISA decision in this case is based on that court's proper application of a well-recognized, fundamental rule in ERISA jurisprudence, which requires that courts defer to the reasonable plan interpretations made by plan administrators that have the discretionary authority to interpret and apply plan terms. Accordingly there is no reason for the Court to grant a Writ of Certiorari to review the Seventh Circuit's ERISA decision in this case.

II. THERE IS NO CIRCUIT CONFLICT CREATED BY THE SEVENTH CIRCUIT'S DECISION IN THIS CASE AND THE NINTH CIRCUIT'S DECISION IN *SAFFLE*.

In an effort to convince the Court to issue a Writ of Certiorari and review the Seventh Circuit's ERISA benefit decision in this case, Ross argues in his Petition (at 17-20) that there is a conflict between the Seventh Circuit's decision in this case and the Ninth Circuit's decision in *Saffle v. Sierra Pacific Power Co. Bargaining Unit Long Term Disability Income Plan*, 85 F.3d 455 (9th Cir. 1996). According to Ross, *Saffle* stands for the proposition that where an ERISA plan does not explicitly allow the plan administrator to consider employer accommodations the plan administrator cannot reasonably interpret the plan so that accommodations can be considered. Ross argues that the instant case cannot be distinguished from *Saffle*, and that the different outcomes in the cases — *i.e.*, a finding that the plan administrator abused its discretion in *Saffle* and a finding that the plan administrator acted reasonably in this case — demonstrate, "if not a direct conflict . . . a conflict in principle." Pet. at 18.

Ross' argument that there is a conflict between the Seventh Circuit's decision in this case and the Ninth Circuit's decision in *Saffle* is based on a flawed and erroneous reading of *Saffle*. Ross' argument that this case is indistinguishable from *Saffle* was properly rejected by the Seventh Circuit. As the Seventh Circuit recognized, *Saffle* does not stand for the broad proposition that a plan administrator can never consider the reasonable accommodations offered to an employee unless there is an express provision in the plan that allows the plan administrator to consider those accommodations. Instead, *Saffle* stands for the proposition that a plan administrator cannot rely on the availability of *other* jobs that would accommodate a participant's disability if the plan's definition of "total disability" makes the participant's right to disability benefits turn on whether the participant can do her *regular* job.

In *Saffle*, June Saffle, a participant in a long term disability plan governed by ERISA, applied for total disability benefits, claiming that she was totally disabled as a result of pain in her neck and arm caused by an exacerbation of injuries suffered in an automobile accident, and as a result of pain and complications related to foot surgery. 85 F.3d at 457. Prior to claiming disability, Saffle worked as a Customer Service Clerk, a clerical job that involved the use of computers, telephones and other office machines, and which also involved interacting with customers. *Id.*

In order to be "totally disabled" and entitled to the benefits that Saffle sought under the plan, Saffle had to be "completely unable to perform each and every duty of [her] regular occupation." *Id.* At least one of Saffle's doctors found that she was unable to do her current job of Clerical Service Clerk, but also found that Saffle was able to do other types of work. *Id.* An independent medical examination was conducted. Saffle's employer advised the independent doctor that Saffle's current job was mostly sedentary and required that Saffle sit for at least 80% of the work day, and advised that there was other "work available for which [Saffle] is qualified that would have enabled her to work with her feet elevated," and which would allow Saffle to be seated essentially all day. *Id.* Based on Saffle's medical condition and the description of Saffle's work, and in light of the other work that was available to Saffle, the independent doctor opined that Saffle was not totally disabled. *Id.*

Saffle's claim for total disability benefits was denied and she took an administrative appeal to the plan administrator. *Id.* at 457-58. The plan administrator interpreted the definition of "totally disabled" — which required that a participant be "completely unable to perform each and every duty of [her] regular occupation" — to mean "the inability to perform substantial portions of the employee's regular job," and as allowing the administrator to consider accommodations that could have been made for the

employee, including other jobs. *Id.* Based on this interpretation of the plan, and on the administrative claim record, the plan administrator denied Saffle's claim for total disability benefits. *Id.*

Saffle brought an ERISA claim to recover benefits under 29 U.S.C. § 1132(a)(1)(B) in federal court, claiming that the plan administrator's interpretation of the plan's definition of "totally disabled" was an abuse of discretion. The district court agreed, entered judgment in favor of Saffle, and remanded the case to the plan administrator "for a determination of the benefits due plaintiff under the Plan." *Saffle*, 85 F.3d at 458.

On appeal from the district court, the Ninth Circuit acknowledged that the plan at issue in *Saffle* granted the plan administrator discretion to determine a participant's eligibility for benefits, and that the applicable ERISA standard of review was the deferential, abuse of discretion standard. *Id.* The Ninth Circuit reviewed the record and the plan administrator's decision, and held that the plan's definition of "totally disabled" — *i.e.*, being "completely unable to perform each and every duty of [her] regular occupation" — did not have to be read literally, and could reasonably be interpreted by the plan administrator as requiring only that the employee be unable to perform the "substantial portions" of the employee's regular job. *Id.* at 458-460. However, the Ninth Circuit held that the plan could not be reasonably interpreted to allow the plan administrator to consider what *other* work was available for Saffle that would accommodate Saffle's disability (and her resulting need to sit the entire day with her foot elevated). *Id.*

According to the court in *Saffle*, the plan administrator's interpretation constituted an abuse of discretion because it allowed the administrator to look beyond whether Saffle could return to her *regular job* and consider *other jobs* that would accommodate Saffle's disability. *Id.* at 459. Such an interpretation was

inconsistent with the plain language of the plan's definition of "totally disabled" in *Saffle*, which expressly and unambiguously required that the plan administrator limit its total disability analysis to whether Saffle could do her *regular* job and not whether Saffle could do other, more accommodating jobs that were available. *Id.* As a result, the Ninth Circuit held that the plan administrator had abused its discretion and remanded the case to the plan administrator so that it could apply the proper total disability standard. *Id.* at 459-461.

As the Seventh Circuit correctly determined in this case:

> *Saffle* does not suggest that it is inappropriate to consider accommodations actually offered to an employee to determine whether he is able to perform the substantial duties of his regular job. The problem in *Saffle* with the accommodations was that they were essentially outside of the realm of Saffle's regular job and therefore were at odds with the policy language at issue. Moreover, the accommodations in that case do not appear to have been actually offered to Saffle; the employer simply stated in seeking doctor's evaluations regarding her ability to work, that there was work available which would allow her to accommodate her disability.

Pet. App. at A-26 to A-27.

In this case, unlike the plan administrator in *Saffle*, the Trustees considered only the accommodations that (1) were actually offered to Ross so that (2) he could return to his *regular employment* as a UniServ Director. The Trustees did not consider what available work other than UniServ Director would have accommodated Ross' medical condition. Accordingly, there is no conflict between *Saffle* and the Seventh Circuit's decision in this case.

In fact, the cases are in harmony with each other. Both cases support the general proposition that a plan administrator can make reasonable interpretations of a plan, but a plan administrator cannot interpret a plan in a manner that contradicts the express, unambiguous terms of the plan. In *Saffle*, the court found that the plan administrator's consideration of other available work that would accommodate Saffle's condition was contrary to the plan's express definition of "total disability," which hinged on whether Saffle could do her regular job. As a result, the plan administrator had abused its discretion. In the instant case, the Seventh Circuit held that because the Plan was silent on the issue of whether accommodations could be considered, and because there was no express bar against considering accommodations in the Plan, the Trustees could consider the accommodations actually offered by Ross' employer that would allow Ross to return to work as a UniServ Director.

Perhaps anticipating that this Court will recognize that there is no actual conflict between the Seventh Circuit's decision in this case and the Ninth Circuit's decision in *Saffle*, Ross argues that there is some "conflict in principle" between the cases that warrants this Court's attention. Pet. at 18. Ross does not elaborate upon or explain in detail just what he means by a "conflict in principle." Ross implies, however, that in *Saffle* the court went beyond the holding in that case and expressed its general hostility toward a plan administrator *ever* considering an employer's offer of accommodations under the ADA when a plan administrator decides a claim for disability benefits under an ERISA plan. Ross suggests that the Seventh Circuit's willingness in this case to allow a plan administrator to consider the accommodations actually offered by an employer where a plan does not expressly forbid a plan administrator from doing so, and where the plan gives the plan administrator the discretion to interpret the plan, somehow demonstrates that the Seventh and Ninth Circuits are in different philosophical camps on the issue of accommodations generally.

To support this speculation about the hypothetical divergence in philosophy between the Ninth Circuit and the Seventh Circuit on the issue of accommodations, Ross stitches together *dicta* in *Saffle* which, when read out of context, suggests to Ross that even though the Ninth Circuit expressly limited its holding to the facts presented in *Saffle*,[2] the Ninth Circuit was in *Saffle* actually telegraphing its opinions on larger issues, such as the propriety of plan administrators ever considering employer accommodations. Because Ross' "conflict in principle" argument is based solely on his expansive reading of *dicta* in *Saffle*, and is nothing more than speculation about accommodation issues outside the scope of the facts actually presented in *Saffle*, there is no legitimate issue on which a Writ of Certiorari should be granted.

III. THE SEVENTH CIRCUIT'S DECISION IN THIS CASE DOES NOT CONTRADICT THE COURT'S DECISION IN *CURTISS-WRIGHT*.

Ross argues that the Court should issue a Writ of Certiorari because the Seventh Circuit's decision in this case somehow contradicts this Court's decision in *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73 (1995). Pet. at 20-22. Nothing in the Seventh Circuit's decision in this case can be read as violating or contradicting the holding in *Curtiss-Wright*.

In *Curtiss-Wright*, the Court addressed the following issue:

> [W]hether the standard provision in many employer-provided benefits plans stating that "The Company

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2. The court in *Saffle* stated:

> We need not, therefore, go further here than to hold that interpreting the Plan's definition of "total disability" to include modification or accommodations to "work available for which she is qualified" was contrary to its plain language.

85 F.3d at 459.

> reserves the right at any time to amend the plan" sets forth an amendment procedure that satisfies [ERISA's requirement that a plan provide a procedure for amending the plan and identify those who have authority to amend the plan].

514 U.S. at 75. In addressing that issue, the Court discussed ERISA's requirement that there be a written plan, that the plan contain procedures for amending the plan, and that the persons with the authority to make such amendments be identified. The Court noted that one reason that Congress created these requirements was to make it easier for the plan participants to know the "essential information about the plan." *Id.* at 83.

According to Ross, the Seventh Circuit's decision in this case contravenes the goals of ERISA discussed in *Curtiss-Wright* because it allows a plan administrator to "rewrite" the terms of an ERISA plan without making a formal amendment to the plan. Pet. at 21. Ross' argument is flawed because it confuses a plan interpretation, which under *Firestone* and its progeny must be reasonable and must not contradict the express terms of the plan, with a plan amendment. Nothing in the Seventh Circuit's decision in this case supports the proposition that a plan amendment can be made without following the plan's amendment procedure. The Seventh Circuit's decision in this case stands solely for the uncontroversial proposition that if a plan is silent on an issue, and if the plan gives the administrator the authority to interpret the plan and resolve ambiguities or omissions in the plan, the plan administrator's interpretation of the plan will stand so long as it is reasonable and not contrary to the express terms of the Plan.

IV. THERE IS NO "ERISA COUNTERPART" TO ANY OF THE QUESTIONS IN THE WRIT OF CERTIORARI ISSUED IN *CLEVELAND*.

The Court has granted a Writ of Certiorari in *Cleveland v. Policy Management Sys. Corp.*, __ U.S. __, 119 S. Ct. 39 (1998), on two questions involving the ADA and what weight should be given to an ADA plaintiff's statement in an application for disability benefits that he is unable to work when a court determines whether that plaintiff is a "qualified individual with a disability" under the ADA, which necessarily requires a determination that the plaintiff can work.

Ross argues that the second issue on which he seeks a Writ of Certiorari in this case — which relates only to Ross' ERISA claim against the Trust — is somehow related to the questions on which the Court has already issued a Writ of Certiorari in *Cleveland.* Pet. at 16. Ross argues that the second question presented for review in this case constitutes, "the ERISA Counterpart to the ADA issue raised in *Cleveland." Id.* According to Ross, this case somehow presents "the Court with an opportunity to clarify the interplay, if any, between the ADA and ERISA in the context of the 'interpretation' of an ERISA welfare benefit plan." *Id.*

Ross does not specifically identify in his Petition how the questions on which a Writ of Certiorari has been issued in *Cleveland* involve issues of benefit plan interpretation under ERISA. Instead, Ross relies solely on his hyperbole that there are larger policy issues stemming from the "interplay, if any" between the ADA and ERISA, and that there is some undefined "issue of far reaching import, potentially affecting all persons who may claim disability benefits under an ERISA Plan," that may, "impact[ ] all workers who attempt to assert their rights under the ADA and ERISA." *Id.* at A-16 and A-22. Ross' argument suggests that, if only the Court were to grant a Writ of Certiorari in this case, such undefined (yet grandiose) issues of public concern would be available for the Court's consideration and clarification.

Ross' vague argument about the "interplay" between the ADA and ERISA is really nothing more than a vehicle for Ross to interject in his Petition a theme that Ross has attempted to raise at each step in this case. From the beginning, Ross attempted to position this case so that it would appear he is either entitled to reinstatement of his "Total Disability" benefits under the Plan, and if not, then necessarily he must be entitled to recover against the Teachers Union under the ADA, or *vice versa*. As things stand, Ross has obtained neither reinstatement of his benefits nor recovery under the ADA, and Ross believes this result to be fundamentally unfair.

The result in this case appears unfair only if one ignores the facts. In this case, Ross was determined to be physically fit to return to work. Instead of returning to work with an employer that had always accommodated Ross' disability (even before the ADA) and that was willing to make reasonable accommodations so that Ross could return to work once again, Ross refused to participate with his employer in the interactive process to establish what accommodations were necessary for Ross to return to his job. Pet. App. at A-30 to A-34. Ross' predicament of having no job as a UniServ Director with the Teachers Union, no "Total Disability" benefits under the Plan, and no actionable claim against either the Teachers Union under the ADA or the Trust under ERISA is not the result of some improper "interplay" between the ADA and ERISA or any act of injustice arising from the Trustees' interpretation of the Plan. Rather, it is the result of Ross' refusal to accept the accommodations that were offered by his employer and his refusal to engage in the interactive process to reach a final agreement as to what accommodations were actually necessary for Ross to return to work. In short, the facts in this case are that Ross could have returned to work with accommodations, but he refused to let that happen.

Additionally, Ross' argument that the Court must issue a Writ of Certiorari in this case so it can address lofty public policy

concerns over the "interplay" between the ADA and ERISA rings hollow when read in connection with the issue that Ross asks the Court to review. Since his post-trial brief, Ross has argued that what the Trustees did wrong in this case was consider the accommodations offered by Ross' employer when the Plan did not *expressly* allow the Trustees to do so. Ross' argument implies that, had the Plan expressly allowed the Trustees to consider the accommodations, there would be nothing improper about the Trustees relying on an employer's offer of accommodations to defeat a claim for disability benefits. However, if there is something inherently improper about an ERISA plan administrator considering ADA accommodations, would not such an impropriety also exist where the plan *expressly* allows the plan administrator to consider such accommodations?[3]

Ross claims in his Petition that the "interplay" between the ADA and ERISA will potentially affect, "*all* persons who may claim disability benefits under an ERISA plan," and, "*all* workers who attempt to assert their rights under the ADA and ERISA." Pet. at 16 and 22 (emphasis added). However, in his next breath, Ross asks the Court to issue a Writ of Certiorari on a very narrow question — one that will address only

> to what extent an ERISA fiduciary may consider ADA accommodations in determining eligibility for the receipt of disability benefits, *where the written ERISA Plan is completely silent on the issue.*

Pet. at 23 (emphasis added). Because Ross fails to link his discussion of grandiose public policy concerns to the specific, narrow issue on which he seeks a Writ of Certiorari, the court should deny Ross' Petition.

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3. Such plans do exist. *See, e.g., Rougeau v. BellSouth Telecomm., Inc.*, 1997 U.S. Dist LEXIS 7860, 1997 WL 299367 (E.D. La. 1997) (discussing an ERISA plan with a disability definition that requires the employee be unable to work, "with or without accommodations.").

What Ross seemingly wants to argue is a case different from this one. It appears he contemplates a case where a plan administrator denies disability benefits on the belief or assumption that the plan participant's physical disability can be reasonably accommodated in the work place, but the employer subsequently refuses to offer those reasonable accommodations, and the participant is denied the chance to return to work and earn a living. That is not this case. Here, the employer, who had accommodated Ross for years before enactment of the ADA, actually offered accommodations to Ross so he could return to work, and the Trustees considered only the accommodations actually offered to Ross by his employer. Ross, in turn, refused to return to work under the terms and timetable offered. That is a matter between Ross and his employer. It does not involve an irreconcilable "interplay" between the Trustees' obligations owed to Ross under ERISA and the Teachers Union's separate obligations owed to Ross under ADA.

V. THE COURT SHOULD DEFER CONSIDERING ANY ERISA ISSUE THAT WOULD OTHERWISE WARRANT THE COURT ISSUING A WRIT OF CERTIORARI IN THIS CASE BECAUSE THE SEVENTH CIRCUIT REMANDED TO THE DISTRICT COURT AN OPEN ISSUE RELATING TO THE PETITIONER'S ERISA CLAIM.

Even if the Court were convinced that some argument advanced by Ross' Petition relating to Ross' ERISA claim warrants the Court issuing a Writ of Certiorari, the Court should refrain from issuing such a Writ and addressing the issue in this case because there is still at least some possibility that Ross may obtain relief on his ERISA claim in the district court. Although the Seventh Circuit reversed the district court's entry of judgment against the Trust on Ross' ERISA claim, the Seventh Circuit also noted that the district court had left open a single issue relating to Ross' ERISA claim, and remanded the case to the district court to further address that single issue. Pet. App. at A-27. That issue is

still unresolved, and the district court has stayed all proceedings relating to that issue until the Court rules on Ross' Petition for a Writ of Certiorari.

Although the Trust believes that there is no proper basis for the district court to find in favor of Ross on the remanded issue, and although Ross' counsel conceded in a post-remand district court proceeding that the most that Ross could obtain by way of a judicial remedy if he were successful on the remanded issue would be for the district court to remand the case further to the Trustees for a new administrative hearing, the presence in this case of at least some possibility that Ross might obtain a favorable judgment on his ERISA claim in the district court — even if remote — makes this case an undesirable proceeding in which to issue a Writ of Certiorari. The Court's limited resources should be allocated to some other proceeding in which it is more certain that the Court's resolution of the issue presented will actually affect the ultimate outcome of the case.

CONCLUSION

The Seventh Circuit's ERISA decision in this case conforms with the decisions of this Court, does not conflict with decisions of other federal courts, and does not warrant further review. The Petition should be denied.

Respectfully submitted,

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